A

CHEONG KAM KUEN

v.

PP

B

FEDERAL COURT, PUTRAJAYA
ZULKEFLI MAKINUDIN CJ (MALAYA)
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASHIM YUSOFF FCJ
ABDULL HAMID EMBONG FCJ
C SULONG MATJERAIE FCJ
[CRIMINAL APPEAL NO: 05-172-2011(W)]
22 OCTOBER 2012

D ***CRIMINAL LAW:*** *Penal Code - Section 302 - Murder - Conviction - Appeal against - Whether evidence led to prove identity of deceased - Whether accused had intention to kill deceased - Whether appellant had intention to cause bodily injury - Whether injuries inflicted sufficient in the ordinary course of nature to cause death - Nature of injuries sustained - Whether offence one of culpable homicide not amounting to murder -*
E *Tham Kai Yau & Ors v. PP*

The accused ('appellant') was charged under s. 302 Penal Code for the murder of one Liew Pai Sea ('deceased') in a hotel room. The cause of death as found by the pathologist ('SP10') was
F severe head injury due to trauma impact which in itself could cause death. Upon rejecting the appellant's defence of, among others, grave and sudden provocation, the High Court ruled that based on the nature and number of injuries inflicted upon the deceased, the appellant had the intention to cause the deceased's
G death. As such, the appellant was convicted for murder under s. 302 Penal Code and upon appeal, this decision was affirmed by the Court of Appeal. Hence, the appellant appealed to this court. The grounds raised by the appellant as to why his conviction for murder could not stand were, *inter alia*, because (i) there was no
H evidence led to prove the identity of the deceased; (ii) the evidence adduced did not establish that the appellant had intention to kill the deceased; and (iii) there was no evidence led by SP10 as to whether the injuries inflicted on the deceased were sufficient in the ordinary course of nature to cause death.

I

Held (setting aside conviction for murder and substituting it with one of culpable homicide not amounting to murder under s. 304(a) Penal Code
Per Zulkefli Makinudin CJ (Malaya) delivering the judgment of the court:

(1) SP10 was present at the scene of the crime, *ie*, the hotel room where the deceased's body was found and she was later requested to conduct a post-mortem upon the deceased on the same day. Hence, it was the same body as found in the hotel room which was also identified by the deceased's father to SP10. Further, there was evidence from the police photographer in relation to the issue of the deceased's identification, who was at the scene of the crime and also present during the deceased's post-mortem. In light of this, there was no merit upon the appellant's ground that there was no evidence led to prove the deceased's identity. (paras 11 - 15)

(2) This court could not agree with the finding of the learned trial judge that based on the nature and number of injuries, the appellant had the intention to cause the deceased's death. Further, both the High Court and the Court of Appeal did not address the fine distinction between ss. 299 and 300 of the Penal Code before coming to a correct conclusion (*Tham Kai Yau & Ors v. PP*; refd). (para 20).

(3) There was no evidence led by SP10 as to whether the injuries inflicted on the deceased were sufficient in the ordinary course of nature to cause death. Based on the nature of the injuries sustained by the deceased, there was evidence of an intention on the part of the appellant to cause bodily injury to the deceased. (paras 20 & 21)

(4) SP10 was quite certain in her evidence that apart from injuries to the head, the other injuries by themselves were not fatal. However, in cross-examination with regards to which injury caused the death, SP10 stated that there were some on the deceased's face and neck and this was an accumulative effect rather than a single injury. Therefore, it was clear that the injuries which caused the deceased's death were those on the face and neck and not the head whereby those injuries were not fatal by themselves. With that, based on SP10's evidence,

A it was not proved beyond reasonable doubt that the injuries inflicted upon the deceased were sufficient in the ordinary course of nature to cause death. (paras 22 & 23)

(5) In view of SP10's medical evidence, this case would fall within
B the second part of s. 299 of the Penal Code. Thus, it can be reasonably brought within the lesser offence of culpable homicide not amounting to murder, falling within the first part of s. 304 (s. 304(a)) of the Penal Code. (para 24)

C ***Bahasa Malaysia*** *Translation Of Headnotes*

Tertuduh ('perayu') telah dituduh di bawah s. 302 Kanun Keseksaan bagi pembunuhan seorang Liew Pai Sea ('si mati') di sebuah bilik hotel. Punca kematian seperti didapati oleh ahli patologi ('SP10') adalah akibat kecederaan teruk di bahagian
D kepala disebabkan hentaman trauma yang dengan sendirinya boleh menyebabkan kematian. Dengan menolak pembelaan perayu, antara lain, provokasi berat dan mengejut, Mahkamah Tinggi memutuskan bahawa berdasarkan sifat dan bilangan kecederaan yang menimpa si mati, perayu mempunyai niat untuk menyebabkan kematiannya.
E Oleh itu, perayu telah disabit kerana membunuh di bawah s. 302 Kanun Keseksaan dan atas rayuan, keputusan ini disahkan oleh Mahkamah Rayuan. Oleh itu, perayu merayu ke mahkamah ini. Antara alasan yang dibangkitkan oleh perayu mengenai sebab kenapa sabitannya tidak boleh bertahan adalah: (i) tiada
F keterangan untuk membuktikan identiti si mati; (ii) keterangan yang dikemukakan tidak membuktikan bahawa perayu mempunyai niat untuk membunuh si mati; dan (iii) tiada keterangan yang diberi oleh SP10 sama ada kecederaan-kecederaan yang dialami oleh si mati mencukupi pada lazimnya untuk menyebabkan kematian.

G **Diputuskan (mengenepikan sabitan untuk pembunuhan; menggantikannya dengan homisid salah tidak berjumlah kepada pembunuhan di bawah s. 304(a) Kanun Keseksaan)**
Oleh Zulkefli Makinuddin HB (Malaya) menyampaikan
H **penghakiman mahkamah:**

(1) SP10 hadir di tempat kejadian jenayah, iaitu, di bilik hotel apabila mayat si mati ditemui dan beliau kemudiannya diminta untuk melakukan bedah siasat atas si mati pada hari yang
I sama. Oleh itu, ia adalah badan yang sama seperti dijumpai dalam bilik hotel yang juga dikenalpasti oleh bapa si mati kepada SP10. Lagipun, terdapat keterangan daripada jurugambar polis berkenaan isu identiti si mati yang turut

berada di tempat kejadian jenayah dan juga hadir semasa bedah siasat si mati. Oleh itu, alasan perayu bahawa tiada keterangan untuk membuktikan identiti si mati adalah tidak bermerit.

(2) Mahkamah ini tidak bersetuju dengan pendapatan yang arif hakim bicara bahawa berdasarkan sifat dan jumlah kecederaan, perayu mempunyai niat untuk menyebabkan kematian si mati. Tambahan, kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan tidak menimbangkan perbezaan halus di antara ss. 299 dan 300 Kanun Keseksaan sebelum mencapai keputusan yang betul (*Tham Kai Yau & Ors v. PP*; dirujuk).

(3) SP10 tidak memberi sebarang bukti berkenaan sama ada kecederaan yang menimpa si mati mencukupi pada lazimnya untuk menyebabkan kematian. Berdasarkan sifat kecederaan yang dialami oleh si mati, terdapat bukti niat perayu untuk menyebabkan kecederaan badan terhadap si mati.

(4) SP10 pasti dalam keterangannya bahawa selain daripada kecederaan pada kepala, kecederaan-kecederaan lain dengan sendirinya bukanlah fatal. Walau bagaimanapun, dalam pemeriksaan balas berkenaan kecederaan mana yang telah menyebabkan kematian, SP10 menyatakan bahawa terdapat beberapa kecederaan atas muka dan leher si mati dan ini adalah kesan terkumpul berbanding dengan kecederaan tunggal. Oleh itu, adalah jelas bahawa kecederaan yang mengakibatkan kematian si mati adalah atas muka dan leher dan bukannya kepala di mana kecederaan tersebut bukanlah fatal dengan sendirinya. Dengan itu, berdasarkan keterangan SP10, ianya tidak dibuktikan melampaui keraguan munasabah bahawa kecederaan-kecederaan yang dikenakan ke atas simati adalah mencukupi pada lazimnya untuk menyebabkan kematian.

(5) Berdasarkan keterangan perubatan SP10, kes ini jatuh di bawah cabang kedua s. 299 Kanun Keseksaan. Oleh itu, ianya dengan munasabah boleh dibawa dalam kesalahan ringan homisid salah yang tidak berjumlah kepada pembunuhan dan jatuh di bawah cabang pertama s. 304 (s. 304(a)) Kanun Keseksaan.

Case(s) referred to:
Fazal Din v. PP [1948] 1 LNS 12 HC ***(dist)***
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC ***(refd)***

Legislation referred to:
Penal Code, ss. 84, 85, 86, 299, 300, 302, 304(a)

For the appellant - Gobind Singh Deo (S Prakash with him); M/s Gobind Singh Deo & Co
For the respondent - Nurulhuda Nur'aini Mohd Nor; DPP

[Appeal from Court of Appeal; Criminal Appeal No: 05-142-2009(W)]

Reported by Kumitha Abd Majid

JUDGMENT

Zulkefli Makinudin CJ (Malaya):

Introduction

[1] This is an appeal by the appellant against the decision of the Court of Appeal in dismissing the appellant's appeal against his conviction by the High Court for an offence of murder under s. 302 of the Penal Code.

[2] The charge framed against the appellant as amended at the close of the prosecution case reads as follows:

> Bahawa kamu di antara 22 Februari 2005 jam 11 malam hingga 23 Februari 2005 jam 7 pagi, di bilik No. 3022 Hotel Fajisan, No. 45, Jalan Barat, Off Jalan Imbi di dalam Daerah Dang Wangi di dalam Wilayah Persekutuan Kuala Lumpur dengan niat telah melakukan bunuh sehingga menyebabkan kematian seorang perempuan Cina nama Liew Pai Sea KPT: 821011-08-5934 oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah s. 302 Kanun Keseksaan.

The Case For The Prosecution

[3] The relevant facts in support of the case for the prosecution are as follows:

(i) The appellant and the deceased occupied room No. 3022 of Hotel Fujisan, Kuala Lumpur. The room was registered under the appellant's name since 12 September 2004.

(ii) On 23 February 2005 at about 6.55am, SP2, an employee of the hotel together with another employee by the name of Tan noticed a puddle of red water outside of room 3022.

(iii) SP2 knocked on the door and asked about the puddle of red water but the appellant refused to open the door. Instead the appellant told SP2 to be quiet and not to disturb him.

(iv) After being informed by SP2, SP3 the hotel manager went up to the said room and knocked on the door asking the appellant to open it but the appellant replied aggressively "jika kamu membuka pintu seseorang akan memukul saya" and that "lebih baik kamu panggil polis".

(v) The police were immediately called. SP5 and SP11 were the first to arrive at the scene. They had asked the appellant to open the door but the appellant replied "kalau you masuk saya akan bunuh ini orang" and "lu balik, jangan kacau saya".

(vi) SP4 who arrived later instructed SP5 and SP11 to break the door. The half broken door however could not be opened as it was blocked by a bed and the TV rack. SP4 managed to see through the broken door, that the room was in a total mess and the appellant standing naked holding a VCD player in one hand and holding the deceased by the hair with the other hand. The deceased's hands and legs were tied.

(vii) When the police finally gained entry into the room, the appellant went into the bathroom dragging the deceased along. The appellant then stood on the toilet bowl and was seen holding a broken bottle shouting "saya bunuh dia orang", saya bunuh dia orang". The appellant was subsequently arrested.

(viii) The cause of death as found by the pathologist SP10 was severe head injury due to trauma impact which in itself can cause death. Other internal injuries present were fracture of left eighth, ninth and tenth ribs. There were other multiple injuries which were not fatal as per post mortem report P37. SP10 said that the chances of survival to a human with injury to the head and face are very slim.

(ix) The chemist SP8 who conducted the toxicology test on the urine and blood of the deceased confirmed them to contain amphetamine and methamphetamine respectively (P34). According to SP8, "seseorang di bawah pengaruh dadah jenis dadah 'psycostimulant' boleh pengaruhi pemikiran kita".

A **The Case For The Defence**

[4] The appellant in his defence amongst others adduced the following relevant facts:

B The appellant said that he and the deceased had a few drinks and were taking drugs called "syabu" before they got into a quarrel which ended with them throwing things at each other. He said the quarrel was due to the fact that the deceased had won a four digit lottery and the deceased would give it to her boyfriend and that the deceased had transferred the
C appellant's house to her boyfriend's name. The appellant also said that he tied the deceased as he was afraid she would throw things at him and that most of the time had to defend himself against her.

D **Findings Of The High Court And The Court Of Appeal**

[5] The learned trial judge of the High Court in his judgment had dealt with the elements needed to prove the murder charge and was satisfied that based on the nature and number of injuries,
E the appellant had the intention to cause the death of the deceased. The learned trial judge was equally satisfied that the appellant caused the death based on the fact that he was the only person with the deceased and based on the circumstances in which he was found, wherein he was armed with one hand and
F holding the deceased with the other.

[6] The learned trial judge had addressed his mind to all the possible defences for a murder charge under s. 300 including defences under ss. 84, 85 and 86 of the Penal Code. The learned
G trial judge ruled that on the defence of sudden fight in the heat of passion, there was no sudden fight. The evidence showed that though there was an argument, it was not a sudden quarrel in the heat of passion. Even if there was one, the appellant had acted in a cruel manner and had taken undue advantage based on the
H injuries found on the deceased and the fact that the deceased was tied with a rope.

[7] On self-defence, the learned trial judge found that since the deceased sustained several fatal injuries and was tied up such defence could not have supported. This is more so when there
I was no evidence that the appellant had suffered any injury. The defence of grave and sudden provocation was also rejected. It was not enough for the appellant to show that he was provoked into

losing his self-control. It must be shown that the provocation was grave and sudden and must have by its gravity and suddenness caused a reasonable man to lose his self-control and induced him to do the act which caused the death of the deceased.

[8] On the defence of intoxication under ss. 85 and 86 of the Penal Code, the learned trial judge found that the appellant was not too intoxicated as not to know what he was doing or that the act was wrong. This was based on the fact that the appellant was able to tie up the deceased and had blocked the entrance to the room preventing other people access to the room.

[9] The Court of Appeal in its decision agreed with the findings of the learned trial judge of the High Court and affirmed the decision of the High Court in finding the appellant guilty of the charge of murder under s. 302 of the Penal Code.

Decision Of This Court

[10] Learned counsel for the appellant in his submission before us advanced four main grounds why the conviction of the appellant for murder cannot stand and they are as follows:

(1) There was no evidence led to prove the identity of the deceased resulting in the prosecution not having made out a *prima facie* case.

(2) The evidence adduced did not establish that the appellant had the intention to kill the deceased.

(3) There was no evidence led from SP10, the pathologist as to whether the injuries inflicted on the deceased were sufficient in the ordinary course of nature to cause death.

(4) The learned trial Judge of the High Court and the Court of Appeal failed to properly evaluate the defence of the appellant, which is to the effect that he had a serious argument with the deceased as a result of which the deceased attacked him.

[11] We shall first deal with the first ground. SP10, Dr. Siew Shue Feng the pathologist said that the post mortem she prepared was of a deceased named Liew Pai Sea. SP10 further went on to say that the body of the deceased was identified by her father Liew Chee Keong. However, the prosecution did not call Liew Chee Keong, nor offer him as a witness throughout the trial. It

was the contention of the defence that this would result in the evidence of SP10, as regards identification being hearsay resulting in a fatal gap in the case for the prosecution. The case of *Fazal Din v. PP* [1948] 1 LNS 12, was cited for this proposition wherein it was held by the Court of Appeal that where a case involved the death of a person on which post-mortem examination has been performed, evidence must be given that the body on which the medical officer conducted the post-mortem examination was the body of the deceased in respect of whose death this charge has been laid and that because of the failure to do so, the conviction for murder could not be sustained. In *Fazal Din's* case the prosecution failed to call a police constable PC9185, a relevant witness to testify that he identified the dead body to the medical officer even though that police constable was present in court at the trial.

[12] With respect to the above contention advanced for the appellant, we find that the factual circumstances in *Fazal Din's* case can be distinguished from the present case on the issues of identification and the identity of the deceased. We therefore find there is no merit on this first ground advanced for the appellant for the following reasons:

[13] It is to be noted in the present case SP10, the pathologist was present at the scene of the crime where the body of the deceased was found at the said hotel room. SP10 was called by ASP Eu (SP12) the investigating officer to visit the scene of the death in room 3022, Hotel Fujisan to assist in the investigation. SP10 was later requested by SP12 to conduct the post-mortem on the same day, 23 February 2005 at 9.40pm.

[14] It is in evidence SP10 said that at the scene of the crime, she found the body of the deceased was naked lying face down in the bathroom of the room, her hands, knees and ankles tied together by ligature material. SP10 then asked the police to transfer the body to the hospital. It is also in the evidence of SP10 that during the post-mortem process after identification of the body she documented the ligature and thereafter removed the ligature and examined the wounds externally on the body. Thus, it was the same body as found in the hotel room which was identified by Liew Chee Keong, the father of the deceased to SP10.

[15] Still on the issue of identification and identity of the deceased in the present case we find there is also the evidence of the police photographer, SP1 who was at the scene of the crime to take the photographs of the deceased. It is to be noted SP1 was present during the post mortem conducted on the deceased by SP10.

[16] We shall now deal with the second, third and fourth grounds raised by the appellant together as they relate to the question of what was the appropriate offence committed by the appellant in the circumstances of the case. Learned counsel for the appellant submitted that the learned trial judge misdirected himself when he failed to rule that the evidence adduced by the prosecution did not establish the appellant had the intention to kill the deceased. Learned counsel for the appellant also submitted that the injuries inflicted on the deceased were not sufficient in the ordinary course of nature to cause death. This in our view would call for the discussion on the distinction between the provisions of s. 299 and s. 300 of the Penal Code to determine whether the offence committed by the appellant falls within the offence of murder under s. 302 of the Penal Code or it falls within the offence of culpable homicide not amounting to murder under s. 304 of the Penal Code.

[17] Section 299 of the Penal Code enacts that a person commits culpable homicide, if the act by which the death is caused is done: (a) with the intention to cause death; (b) with the intention of causing such bodily injury as is likely to cause death; (c) with the knowledge that he is likely by such act to cause death.

[18] Section 300, Penal Code defines murder as follows: Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: (1) with the intention of causing death; (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; (3) with the intention of causing such bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; (4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.

[19] On the correct approach to the application of the two ss. 299 and 300 of the Penal Code we would endorse the views expressed by Raja Azlan Shah FJ (as his Royal Highness then was) in the case of *Tham Kai Yau & Ors. v. PP* [1976] 1 LNS 159; [1977] 1 MLJ 174 at p. 176 as follows:

> Section 299 clearly defines the offence of culpable homicide. Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s. 300, Penal Code apply, and (b) where the necessary degree of *mens rea* specified in s. 299 is present, but not the special degrees of *mens rea* referred to in s. 300, Penal Code. We would like in this connection to express the need to bear in mind that all cases falling within s. 300, Penal Code must necessarily fall within s. 299, but all cases falling within s. 299 do not necessarily fall within s. 300. The first part of s. 304, Penal Code covers cases which by reason of the exceptions are taken out of the purview of s. 300, cls. (1), (2) and (3) but otherwise would fall within it and also cases which fall within the second part of s. 299, but not within s. 300, cls. (2) and (3). The second part of s. 304, Penal Code covers cases falling within the third part of s. 299 not falling within s. 300, clause (4).

[20] In the present case, it is our view based on the nature of the injuries sustained by the deceased, there was evidence of an intention on the part of the appellant to cause bodily injury to the deceased. However, we do not agree with the finding of the learned trial judge that based on the nature and number of injuries, the appellant had the intention to cause death to the deceased. We noted that both the learned trial judge and the Court of Appeal in their decision did not address themselves on the fine distinction between s. 299 and s. 300 of the Penal Code before coming to a correct conclusion.

[21] We are in agreement with the submission of learned counsel for the appellant that there is no evidence led from SP10, the pathologist as to whether the injuries inflicted on the deceased were sufficient in the ordinary course of nature to cause death. The evidence of SP10 is to the effect that the deceased suffered multiple injuries. She said:

> most of the injuries caused by the blunt object. However wound No. 52 caused by sharp object. (See p. 70 of Appeal Record Volume 1).

SP10 further stated as follows: A

> The injury to the head can cause death whereas the others are not fatal by itself.
>
> This kind of injury, the chances of survival to a human. In this particular case, the chances is very slim because the injury on the face and on the head. (See p. 71 of Appeal Record Volume 1). B

[22] It is to be noted SP10 is quite certain in her evidence that apart from injuries to the head, the other injuries by themselves were not fatal. In cross-examination by the defence as regards C which injury caused the death, SP10 stated that some on the face and neck of the deceased and this is an accumulative effect rather than single injury. It is therefore clear that the injuries which caused the death to the deceased were those on the face and neck, not the head and that those injuries are not fatal by D themselves.

[23] We are of the view based on the above evidence of SP10 it was not proved beyond reasonable doubt that those injuries inflicted upon the deceased were sufficient in the ordinary course of nature to cause death. E

[24] In view of the nature of the medical evidence given by SP10, the pathologist as earlier highlighted, it is our considered view that the present case would fall within the second part of s. 299 of the Penal Code. It is our judgment that this is a case F which can reasonably be brought within the lesser offence of culpable homicide not amounting to murder, falling within the first part of s. 304 (s. 304(a)) of the Penal Code.

Conclusion G

[25] For the reasons abovestated we set aside the conviction of the appellant for murder, and substitute it with one under the first part of s. 304 (s. 304(a)) of the Penal Code. We now invite learned counsel for the appellant and learned Deputy Public H Prosecutor to address us on the sentence to be meted out on the appellant.

I